*United States Government*
***National Labor Relations Board***
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: January 17, 1997

TO : Terry C. Jensen, Acting Regional Director
Region 19

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

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SUBJECT: IBEW Local 48
Case 36-CB-2052

This case was submitted for advice on whether the Union violated Section 8(b)(1)(A) and (2) by threatening and causing the termination of an employee for his refusal to remit 3.5 per cent of his wages to the Union's market recovery fund.

## FACTS

### The Market Recovery Fund

The "Electrical Industry Advancement Fund" or market recovery fund (MRF) is a program initiated by the IBEW and in the instant matter administered by IBEW Local 48 (the Union). The program is designed to maintain or improve the Union's share in the local construction market by subsidizing the wage costs of Union employers who bid on certain projects. Under this program, 3.5 per cent of an employee's wages are paid to the Union-managed fund. The Union unilaterally decides what jobs to target and uses the fund to provide a wage subsidy either to the contractor or directly to the employees on the targeted job.

Market recovery money is typically deducted by employers from employee wages. Charging Party Mulcahy explains that he typically signs a checkoff authorization form when he is dispatched to a job through the Union's hiring hall. Mulcahy describes the practice as follows:

> The dispatcher at the Local 48 hiring hall will hand the dispatch slip and a copy of the checkoff authorization form to the person dispatched. The employee then signs the form and gives it back to the Union. The Union tears off a copy of the form for their records and then gives the form

> back to the person to take to the [e]mployer. The person then takes the dispatch slip and the checkoff authorization to the [e]mployer. [1]

**The Department of Labor (DOL) Rules that Market Recovery Funds Violate the Davis-Bacon Act[2]**

In 1991, the Department of Labor ruled that programs such as the market recovery fund violate the Davis-Bacon Act.[3] DOL's administrative ruling was upheld by the U.S. Court of Appeals for the D.C. Circuit in Building and Const. Trades Dept., AFL-CIO v. Reich.[4] Specifically, the court upheld DOL's determination that job targeting programs contravene the purpose of Davis-Bacon by artificially increasing the prevailing local wage rate which must be met by non-union employers, by the inclusion in the local average of the pre-deduction wages paid by the unionized employers before the deduction. In addition, union employees suffer a reduction in the wages through the union deductions.[5] Further, the court found

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[1] Mulcahy states that regular Union dues are paid directly to the Union office (i.e., "at the window") on a monthly basis. He is not aware of any member who is allowed to pay their regular monthly dues through payroll deduction. The only alternative to paying at the window of which he is aware is that some members authorize their monthly Union dues to be automatically deducted from their credit union account.

[2] 40 U.S.C. Section 276(a) (1988).

[3] Building and Construction Trades Unions Job Targeting Programs, 1991 WL 494718 (W.A.B. 1991) The Department of Labor's ruling specifically attacked "job targeting programs (JTP)," which, by their description, are functionally identical to the market recovery program at issue here.

[4] 40 F.3d 1275 (D.C. Cir. 1994), aff'g, Building and Constr. Trades Dept. v. Reich, 815 F.Supp. 484 (D.D.C.), reconsideration den., 820 F.Supp. 11 (D.D.C. 1993).

[5] 40 F.3d at 1280.

> the JTP funding scheme creates a second opportunity for doing violence to the goals of the [Davis-Bacon] Act when the targeted programs drawing on the fund are also Davis-Bacon projects in that the employers on the recipient project are paying their employees in part with a subsidy derived from deductions taken from other Davis-Bacon employees.[6]

In addition, the court considered whether the funds deducted from employees for JTPs are actually membership dues, the collection of which are permitted by the anti-kickback regulations under the Copeland Act.[7] The court found it "clear that these regulations evince an overarching concern that deductions from the employee's prevailing wage under the Davis-Bacon Act do not benefit the employer directly or indirectly."[8] Thus, the court agreed with DOL's conclusion that the JTP deductions, which revert to contractors, are not permissible as membership dues under section 3.5(i) of the Copeland Act.[9]

Finally, the court considered whether the JTP deductions would be considered membership dues under the NLRA. The unions had argued that membership dues under Davis-Bacon must be harmonized with the NLRA definition. Relying upon Beck v. Communication Workers of America,[10] the D.C. Circuit concluded that "even if the NLRA were relevant to the meaning of membership dues in [DOL's] regulations," JTP deductions would not qualify as periodic dues that a non-union member may be required to pay under the NLRA as

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[6] Ibid.

[7] 29 C.F.R. Section 3.1 (1994). The Copeland Act was designed to aid in the enforcement of the prevailing wage provisions of the Davis-Bacon Act which permits deduction for union dues.

[8] 40 F.3d at 1281.

[9] Ibid.

[10] 487 U.S. 735 (1988).

they are not "limited to those funds necessary for collective bargaining, grievance adjustment, and contract administration."[11]

The Ninth Circuit also considered whether the IBEW's job targeting programs violate the Davis-Bacon Act in IBEW, Local 357 v. Brock.[12] In that case, the issue was before the court as a result of the IBEW's effort to collect job targeting monies it claimed were owed by several union members who refused to pay. The court, relying heavily on the D.C. Circuit's analysis in Building and Const. Trades v. Reich, supra, also found the job targeting deduction to be prohibited by the Davis-Bacon Act.

In subsequent correspondence with counsel for the Building and Construction Trades Council, DOL clarified its view of the legality of job targeting programs, as well as its enforcement policy. Maria Echaveste, Administrator of DOL's Wage and Hour Division, stated in a June 20, 1995 letter:

> Where there are no payroll deductions for dues and employees pay their union dues directly to the unions, the union may use the dues to fund a job-targeting program -- without regard to whether a portion of the dues is earmarked for job targeting.

More recently, in a letter dated May 30, 1996, Bernard Anderson, Assistant Secretary of DOL's Employment Standards Administration, states,

> I would like to emphasize the Department's consistent position that payments made by employees, whether directly or through wage deductions, to fund job targeting programs violate the Copeland Act regulations at 29 CFR Part 3 if the workers are employed on Davis-Bacon covered construction projects, and violate the Davis-Bacon Act as well if the effect is to lower

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[11] 40 F.3d at 1282, citing Beck v. CWA, 487 U.S. at 745.

[12] 68 F.3d 1194 (1995).

> the workers' wages below the prevailing wage rate.

Anderson explained that, in limited circumstances, the Department may view a job targeting payment as a "technical violation" but that "the practical problems of tracing the funds to establish violations and allocate back wage liability in these circumstances would be such that it would be a poor use of the Department's scarce investigative and litigation resources to pursue such cases." Therefore, he reiterated the policy enunciated by Administrator Eschaveste which "applies to the following very narrow, limited circumstances where the relationship between the dues payments on Davis-Bacon projects and the job targeting project is remote and the investigation would be very resource-extensive." He stated,

> Specifically, the Administrator stated that the Department would not take exception to the funding of job targeting programs by dues payments where dues are deducted from wages and deposited in a general fund used for a variety of purposes at the discretion of union officers, including from time to time a job targeting program. The administrator set forth a number of limitations, including that there be no formal or informal mandate that funds be spent on job targeting or be earmarked for that purpose. In addition, the Administrator stated that the Department would not take exception to situations where job targeting programs are funded through direct payment of union dues by employees, rather than through payroll deductions by the contractor from wages paid on Davis-Bacon projects.

Thus, based on upon these two letters it is clear that:

1) The DOL views any job targeting payments made by employees on federal funded projects to be violative of the Davis-Bacon Act. A violation is committed without regard to whether the payments are made by payroll deduction or made directly by an employee to the union.

2) However, DOL has adopted an enforcement policy in which they would not prosecute even

> though there is a violation of the Davis-Bacon Act. This is a limited policy and would only apply where job targeting payments are made from a union's general dues revenue, which dues were deducted from employee wages. Further, there can be no mandate that funds be spent on job targeting, nor can a union earmark funds in any way to be spent on job targeting. In addition, there is an exception to the no earmarking rule. If the dues are paid directly by the employees to the union, then DOL will not prosecute even though a portion of the general fund is earmarked for job targeting.

**The Union’s Efforts to Collect Past Due Market Recovery Payments from the Charging Party**

Charging Party Mulcahy is a member of the Union. He is dispatched from an exclusive hiring hall operated pursuant to the Union’s collective-bargaining agreement with the National Electrical Contractors Association (NECA). The collective-bargaining agreement contains a valid union-security clause. At some time in early 1995,[13] Mulcahy was dispatched to work for Excalibur Electric, a subcontractor on the Oregon Health Sciences University (OHSU) project. As was his practice, he signed a checkoff authorization. However, when he arrived on the job, he gave his dispatch slip and his checkoff authorization to a woman in the Excalibur office. The woman took the dispatch slip, but refused to take the checkoff authorization form. She informed Mulcahy that Excalibur was not making any deductions. Mulcahy was later informed that Excalibur’s refusal to accept the checkoff authorization had "something to do with prevailing wage," and that Excalibur did not want to get involved in any lawsuits so they weren’t making any deductions.[14]

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[13] All dates are in 1995.

[14] Although there was federal money involved in the large OHSU project, the specific aspect of the OHSU project that Mulcahy worked on did not involve any federal money. Mulcahy’s project did receive state funds and was therefore a "little Davis-Bacon" job, i.e., it was governed by the Oregon prevailing wage laws.

Mulcahy discussed with the Union steward on the job Excalibur's refusal to deduct the market recovery money. The steward told him that employees would be expected to mail in the contributions. Mulcahy refused to mail in the contribution since he believed he should not be obligated to pay if the employer would not make the deduction. He stated that "it bothered me greatly that the contractor was afraid to deduct the money because they didn't want to be part of a lawsuit."

In June, Mulcahy began working for Kingston Electric (the Employer). Sometime after July 13, Mulcahy received a letter from the Union stating that he owed $377.32 in market recovery contributions for his earlier work for Excalibur on the OHSU project.[15] Mulcahy called the Union and explained that the contractor on the hospital project had refused to deduct the money from his paycheck, and that Mulcahy did not believe he owed the Union any money from that job. He received one more letter from the Union stating that he owed the money, and that if he failed to pay the Union would issue a "stop work" letter to the Employer.

On July 17, Union business representative Keith Edwards visited Mulcahy at the Employer's job site and informed him that the Union had issued a stop work letter to the Employer. Edwards told Mulcahy he had until July 19 to pay the market recovery money he owed from the OHSU job, or he would be out of work. On the morning of July 19, Lloyd Palmer, the Employer's general foreman, called Mulcahy into his office and informed him that he was being terminated for cause for failure to pay dues. Mulcahy paid the Union the outstanding market recovery money that morning and he was issued a new dispatch slip to the same job with the Employer. He continued working for the Employer for approximately one month.

During the summer of 1995, Mulcahy worked for Blessing Electric on the East Side Light Rail project for two days.

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[15] The letter was mailed in June, but Mulcahy was not living at home at the time and did not see a copy of the letter until later.

This project was clearly a federal Davis-Bacon job as it received funds from the U.S. Department of Transportation. Mulcahy used the same procedure described above when he was dispatched to this job: He was given a dispatch slip and checkoff authorization, signed the checkoff authorization and gave a copy to the Union. When he reported to the job, he gave his paperwork to the woman in the office. She separated the dispatch slip from the checkoff authorization and said she was not taking the checkoff authorization "because of the prevailing wage stuff." Mulcahy did not pay the market recovery money incurred while working at Blessing Electric.

A couple of months after Mulcahy worked for Blessing Electric on the light rail project he received a letter from the Union stating that if within 15 days he did not pay the market recovery contribution owing from that job they would issue a stop work order to his then-current employer. Mulcahy paid the market recovery contribution owing from Blessing Electric "because I didn't want to get pulled off another job."

In the Fall of 1996, the Union attempted to change the local by-laws concerning market recovery money to combine the market recovery money with regular dues and have them collected at the Union office.[16] The proposal also provided that the 3.5 per cent contribution would be gradually reduced to 2.5 per cent over the next eighteen months. According to Mulcahy, the Union has always stated a target balance of $5 million for the Market Recovery Fund. The proposed changes to the by-laws were rejected by the Union membership.

The Union provides all members with a Receipt for Dues and Assessments at the end of each calendar year. A member's receipt for calendar year 1995 demonstrates that the Union does not include market recovery payments in the "Membership Dues Received" category. Instead, the "Market Recovery Dues Received" is listed separately from membership dues.

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[16] The pre-existing bylaws clearly provide that the market recovery fund "shall be separate from the General Fund . . . ."

## ACTION

The Region should issue complaint, absent settlement, consistent with the following instructions.

**Established Board Principles:**

Section 8(a)(3) authorizes a union to require all employees whom it represents and who are covered by a valid union-security agreement to pay all "periodic dues and initiation fees uniformly required as a condition of acquiring or retaining [union] membership."[17] It is well-settled that the words "dues and initiation fees uniformly required" do not include assessments, fines, penalties, or any charges except dues and initiation fees.[18] Therefore, it is a violation of Section 8(b)(1)(A) and (2) for a union to seek an employee's discharge, under a union security clause, for his failure to pay an "assessment."[19]

Board law regarding the definition of "dues" versus "assessments" is muddled. Current Board law on this issue finds its genesis in NLRB v. Food Fair Stores, Inc.,[20] where the court enforced a Board order finding, inter alia, that the union violated Section 8(b)(1)(A) and (2) by threatening employees with discharge for failing to pay a strike fund assessment. In its discussion of whether the strike fund assessment should be considered an assessment or "periodic dues" under Section 8(a)(3) of the Act, Judge Forman stated,

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[17] Detroit Mailers Union No. 40, 192 NLRB 951, 951-952 (1971).

[18] Local 455, United Brotherhood of Carpenters & Joiners of America, AFL-CIO (Building Contractors Association of New Jersey), 271 NLRB 1099, 1100 (1984), citing Peerless Tool and Engineering Co., 111 NLRB 853, 871 (1955), enfd. sub nom. NLRB v. Die & Tool Makers Lodge 113, 231 F.2d 298 (7th Cir. 1956), cert. denied 352 U.S. 833 (1956).

[19] Teamsters Local 959 (RCA Service Co.), 167 NLRB 1042 (1960).

[20] 307 F.2d 3 (3d Cir. 1962).

> It is clear that the term "periodic dues" in the usual and ordinary sense means the regular payments imposed for the benefits to be derived from membership to be made at fixed intervals for the maintenance of the organization. An assessment, on the other hand, is a charge levied on each member in the nature of a tax or some other burden for a special purpose, not having the character of being susceptible of anticipation as a regularly recurring obligation as in the case of "periodic dues".[21]

In Teamsters Local 959 (RCA Service Co.), the Board adopted Judge Foreman's reasoning, stating that the court "drew the distinction which we find delineates the 'periodic dues' which a union may validly require employees to pay."[22] The Board elaborated on the test by stating that Section 8(a)(3) dues that go to costs "incurred by the collective bargaining agent in representing [the employees]" do not include charges that do not "contribute to the cost of operations of a union in its capacity as a collective bargaining agent."[23] Applying this test, the Board in Local 959 found credit union and building fund collections to be assessments rather than periodic dues. The Board relied upon its finding that the collections "are clearly not for the support and maintenance of the Respondent as an organization but are special purpose funds established by the Respondent to accomplish ends not encompassed in its duties as a collective-bargaining agent of the employees."[24]

On the other hand, in Detroit Mailers Union No. 40 (Detroit Newspaper Publishers Association),[25] the Board

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[21] Id. at 11.

[22] 167 NLRB at 1045.

[23] Ibid.

[24] Id. at 1044.

[25] 192 NLRB 951 (1971).

found the ALJ's reliance upon Teamsters Local 959 misplaced, and rejected his conclusion that the disputed funds were not "periodic dues" but special purpose funds.[26] The Board specifically disavowed "any distinction between dues which may be allocated for collective-bargaining purposes and those earmarked for institutional expenses of the union." Rather, the Board stated that Section 8(a)(3) dues are those that are "periodic and uniformly required and are not devoted to a purpose. . . inimical to public policy."[27]

Nevertheless, based on the Food Fair test, and notwithstanding their decision in Detroit Mailers, the Board has continued to consistently hold that fees levied for the "special" purpose of establishing or maintaining a strike fund are assessments and not dues, because they are levied in addition to dues and for a special purpose.[28] The Board has never reconciled the approaches taken in Local 959 and Detroit Mailers.[29]

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[26] Id. at 952 (fees for old age pension and mortuary funds and for a printers' home).

[27] Ibid.

[28] See Newspaper Guild Local 82 (Seattle Times), 289 NLRB 902, 912 (1988), remanded 877 F.2d 998, 1003 (D.C. Cir. 1989) (Board found strike defense fund to be assessment where contributions were used for specific purpose (financing strike and lockout expenses), were placed in bank account separate from other union funds and generally not used for "general fund" purposes, and since it was not possible for members to anticipate when and for what duration defense fund payments would be made); Plumbers Local 81 (Morrison Construction Co.), 237 NLRB 207, 210 (1978) (one-time levy designed to meet anticipated emergency situation in the event of a strike); Carpenters Local 455 (Building Contractors), 271 NLRB 1099, 1100 (1984) ("strike assessment" funds kept separate from union treasury to be used for strike activities, and no indication whether it was of limited duration or adopted in relation to a particular strike).

[29] Recently, the Board has avoided distinguishing dues from assessments where possible. See UFCW Local 1 (Big V

**Application of Established Principles:**

Applying the established principles outlined above to the facts of this case, the Region should issue complaint alleging that, under the Teamsters Local 959 test, the Union violated Section 8(b)(1)(A) and (2) when it threatened Mulcahy with discharge and had him pulled off the job at Kingston Electric in retaliation for his refusal to pay the market recovery contribution incurred when he worked for Excalibur Electric. In addition, the Region should allege that, under both the Teamsters Local 959 and Detroit Mailers tests, the Union further violated Section 8(b)(1)(A) and (2) when it threatened Mulcahy with discharge for his refusal to pay the market recovery contribution incurred when he worked for Blessing Electric.

**The Excalibur Job: The Union's Demand for Mulcahy's Market Recovery Contribution Incurred when he Worked for Excalibur Electric:**

The market recovery payment is an assessment and not dues under Local 959 since it is for a special purpose, collected in addition to dues, and does not contribute to the general operating costs of the Union. In this regard, it is clear that the market recovery fund is for the special purpose of maintaining or improving the Union's share in the local construction market. While this might

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Supermarkets), 304 NLRB 952, 952 (1991), enfd. 141 LRRM 2257 (2d Cir. 1992); General Electric, 299 NLRB 995, n. 3 (1990) (case resolved under Philadelphia Sheraton, 136 NLRB 888 (1962), enfd. 320 F.2d 254 (3d Cir. 1963)); Pacific Northwest Newspaper Guild Local 82 (The Seattle Times), 289 NLRB 902 (1988) (Board agreed with ALJ's finding that the increased portion of dues were not sufficiently regular to be termed "periodic" and found it "unnecessary to pass on the judge's discussion of the standard to be applied in determining whether the purposes for which dues payments are expended will cause such payments to fall outside the definition of 'periodic dues' . . . "). See also D.C. Circuit's decision in Seattle Times, 131 LRRM 2924, 2926-2927 (1989), remanding to the Board for a "coherent reconciliation of its own precedent." The case has since settled.

be worthwhile goal which inures to the benefit of the Union as an institution and to its members, it is a purpose which is distinct from the general maintenance of the organization. In this respect, the payment is analogous to that which the Board deemed an assessment in Local 959 (building fund and members' credit union) and Welsbach Electric, 236 NLRB 503, 514, 521 (1978) (loan fund for unemployed workers).

In addition, the market recovery payment is more in the nature of an assessment since it is maintained in a separate account. The Union's by-laws clearly specify that the market recovery contributions are to be maintained in a fund separate from the General Fund.

Finally, the market recovery payment does not appear to be part of the Union's dues structure because the Union does not treat the payment as regular dues. Instead, the Union clearly treats the market recovery payment as a distinct financial obligation. In this regard, it is noteworthy that the Union lists "Membership Dues" and "Market Recovery Dues" separately on the annual statement of dues and assessments provided at the end of each year to all members. In addition, Charging Party Mulcahy has testified that his market recovery money is collected separately from his general working dues. Copies of his pay stubs from several employers demonstrate a separate itemization for market deductions. In fact, Mulcahy avers that while market recovery payments are generally deducted by employers, general working dues are usually paid separately by members "at the window."[30] For these reasons,

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[30] Mulcahy is aware that some members mail in their general working dues and others authorize the Union to deduct the dues directly from the member's credit union account. According to the Union's local attorney, a limited number of members authorize the deduction of general membership dues directly by their employers. It is not known whether, in those limited circumstances, the market recovery payment would appear as a separate deduction from the general membership dues on the employee's pay stub. Although unlikely given the Union's separate itemization of dues and job targeting payments, even if the market recovery money is collected together with the general membership dues in those limited circumstances, the market recovery payment is still an assessment. Regardless of how it is collected, it

the Region should argue that the market recovery payments are assessments as defined by the Board in Teamsters, Local 959.

The Region should not rely upon Detroit Mailers to argue that the Union's extraction of market recovery money from Mulcahy for his work at Excalibur is unlawful. The Excalibur job was not a federal prevailing wage job. Since it was not a federal prevailing wage job, the Davis-Bacon regulations would not apply and it does not appear that the Department of Labor would be concerned with market recovery payments taken from employee wages on this job. Therefore, the Region should not argue that the forced exaction of payment from Mulcahy for his work at Excalibur was unlawful under Detroit Mailers since it is not "inimical to public policy."

**Blessing Electric, a Federal Davis-Bacon Project: The Union's Demand for Mulcahy's Market Recovery Contribution Incurred when he Worked for Blessing Electric:**

The rationale applied above to the Excalibur job supports a violation for the Union's threat to have Mulcahy discharged in retaliation for his failure to pay market recovery money incurred while he worked for Blessing Electric. However, since the Blessing Electric job was a Davis-Bacon job, it is unlawful as well under the Detroit Mailers rationale.

Initially, we note that although Mulcahy did sign a check-off authorization to have Blessing Electric deduct market recovery money from his wages, the employer refused to make the deduction. Later, under threat of discharge, Mulcahy paid the Union directly for his market recovery contribution incurred at Blessing Electric.

Asst. Secretary Anderson's letter is abundantly clear that Department of Labor views as unlawful any payment of market recovery money from employee wages on a Davis-Bacon

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is for a special purpose, is maintained in a separate account from the Union's general fund, and is separately itemized on the member's annual receipt of dues and assessments.

job, whether that payment is deducted by employers from employee wages or paid directly to a union by the employee. Although the Department has taken the enforcement position, for practical purposes, that it "will not take exception" to situations where the programs are funded through direct payment of union dues by employees, that position does not detract from its view that such payments are unlawful. Therefore, it is clear that even an employee's direct payment of market recovery money to a union would violate the Davis-Bacon regulations.

In these circumstances, the Region should argue that the Union's forced exaction of market recovery money from Mulcahy under threat of discharge for wages he earned on a Davis-Bacon project is inimical to public policy. It is immaterial that the Department of Labor would not enforce its policy against either Mulcahy or the Union for this payment. Mulcahy was familiar with the DOL litigation. He was aware that the market recovery programs had been found unlawful. It was very clear to him that his employers -- both Excalibur and Blessing Electric -- wanted to avoid any potential liability by participating in the deduction of market recovery payments. As Mulcahy stated, "it bothered me greatly that the contractor was afraid to deduct the money because they didn't want to be part of a lawsuit." Under Detroit Mailers, it seems clear that the Board would not condone the forced payment of wages pursuant to a union-security clause from an employee who exercised his choice to refrain from participating in an unlawful program.[31]

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[31] We would distinguish the instant case from that presented in IBEW (Wagner-Smith Company), Cases 9-CB-8493, et al., Advice Memorandum dated July 8, 1993. In that case, we were essentially presented with a similar issue involving a job targeting program of an IBEW local. In the Wagner-Smith case, Advice concluded that there was no violation under the Local 959. Applying the Local 959 test, Advice concluded that since the JTP funds were not collected separately, but instead were a mere reallocation of the existing working dues, the Board would not get involved in examining the internal allocation of union funds. In contrast, in the instant case, the market recovery contributions are paid in addition to the Union's working dues, highlighting their distinction from general working dues and indicating that the payments are intended for a

**The General Counsel's Position:**

It is the General Counsel's view that the Detroit Mailers test is more appropriate for determining whether a payment to a union is dues or an assessment. [*FOIA Exemptions* 2 and 5

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**Conclusion:**

[*FOIA Exemptions* 2 and 5

special purpose. This is not a "mere reallocation" of dues. In addition, the union involved in the Wagner-Smith case did not threaten or cause the discharge of the charging party, who filed a charge merely to object to the program. Finally, at the time of the Wagner-Smith memorandum the ruling of the Wage Appeals Board had only been upheld by the district court. Therefore, it would have been premature to apply a Detroit Mailers analysis. Subsequently, two circuit courts have affirmed the DOL's position and DOL has been steadfast in its view that job targeting payments on federally funded jobs violate the Davis-Bacon Act.

[*FOIA Exemptions* 2 and 5, cont'd.

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B.J.K.